No. 89-700

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Petitioner,
v.
SHURBERG BROADCASTING OF HARTFORD, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE COMMITTEE TO PROMOTE DIVERSITY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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February 9, 1990

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Committee to Promote Diversity respectfully requests leave to file the accompanying brief amicus curiae in behalf of Petitioner, Astroline Communications Company, Limited Partnership. Both the petitioner and the Acting Solicitor General of the United States have consented. This motion is necessitated by the fact that Petitioner, Shurberg Broadcasting of Hartford, Inc. has not consented.

The Committee to Promote Diversity is a group of organizations—principally licensees and financiers of broadcast stations—that have worked to foster the First Amendment principle of diversity of programming by increasing the numbers of minority-owned broadcast stations through appropriate means, including the distress

sale policy, the constitutionality of which is at issue in this case.

The Committee membership encompasses both minority and nonminority station owners. The Committee is thus uniquely able to present to the Court a racially balanced perspective on the issue in this case, of which it has first-hand knowledge and experience. Committee members have actively participated in the implementation of the Congressionally mandated policies administered by the Federal Communications Commission that serve the compelling public need for diversification of broadcast programming sources and increased participation by minorities in the ownership of broadcast stations. These policies include the distress sale policy, along with the enhancement of credit for integration of minority ownership and management in FCC comparative licensing proceedings, and the issuance of tax certificates conferring tax deferral benefits on FCC licensees who sell their stations to minority buyers.

Members of the Commmittee have participated in the design and drafting of the FCC Policy Statement on Minority Ownership, and have testified on the subject at Congressional and FCC hearings and industry conferences. Members have also, as entrepreneurs, served the Congressional objective of increasing the number of minority-owned broadcast stations as a means of helping to meet the Congressionally declared compelling public need for diversification of the sources of broadcast programming.

The members of the Committee are:

Broadcast Capital Fund, Washington, D.C. (MESBIC)

Cook Inlet Communications, Inc. (holding corporation for 2 TV and 11 radio stations)

Four Star Broadcasting Company (former licensee of KTHT (TV) Houston, Texas)

George N. Gillett, Jr. / Gillett Holdings, Inc. (owners of eleven television stations)

Kyles Broadcasting, Ltd. (TV station permittee for Channel 50, Memphis, Tenn.)

Minority Broadcast Investment Corporation (MESBIC)

National Institute for Communication and Education (media consultants)

Silver Spring Communication (Awarded Initial Decision for new FM station in Silver Springs, Florida)

The experience, understanding, commitment, and concern of the Committee's members, coupled with their inter-racial composition, uniquely qualified the Committee to provide useful assistance to the Court. Accordingly, the Committee to Promote Diversity respectfully moves that the Court grant it leave to file the accompanying Brief Amicus Curiae in support of the Petitioner.

Respectfully submitted,

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BRIEF OF THE COMMITTEE TO PROMOTE DIVERSITY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Committee to Promote Diversity is an *ad hoc* group of organizations and individuals that, through their involvement in telecommunications, have worked to foster the First Amendment principle of diversity of programming by increasing the representation of minorities and women among the owners of broadcast stations. The Committee is composed of Commission licensees and permittees that have utilized one or more of the race- or gender-conscious policies adopted by the Federal Communications Commission pursuant to Congressional and judicial direction: mainly the distress sale policy, the

tax certificate policy or the comparative hearing "enhancement" policy.

Each of the members of the Committee has long been concerned with the integrity of the procedures under which the Federal Communications Commission awards licenses and approves station transfers. Committee members have testified at hearings on minority ownership held by Congress, the Commission, and private industry. Many of the Committee members participated in the design and drafting of the FCC Policy Statement on Minority Ownership adopted over a decade ago. Since that time, many members have utilized these policies in the public interest and through prudent entrepreneurship have increased the number of minority-owned broadcast stations, thus serving the judicially, legislatively, and administratively recognized goal of greater diversity of programming sources for the entire viewing and listening public, nonminority as well as minority.

By virtue of their experience, understanding, and commitment to the central issues presented here, the following members of the Committee to Promote Diversity are uniquely qualified to address the Court as *amicus curiae*:

Broadcast Capital Fund, Washington, D.C. (MESBIC)

Cook Inlet Communications, Inc. (holding corporation for 2 TV and 11 radio stations)

Four Star Broadcasting Company (former licensee of KTHT (TV), Houston, Texas)

George N. Gillett, Jr. (owner of 11 TV stations)

Gillett Holdings, Inc.

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Silver Springs Communication (awarded Initial Decision for new FM station in Silver Springs, Florida)

OPINIONS BELOW

A sharply divided panel took four years to decide this case. Three lengthy separate opinions collectively totaling 110 printed pages were issued. Two of three judges remanded the proceeding to the Commission, finding that the distress sale policy is unconstitutional because it "is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989) (*per curiam* opinion at 2). Although the judges in the majority accompanied the short *per curiam* opinion of the Court with 67 pages of separate opinions, they agreed only in finding that the distress sale policy is unconstitutional because it "unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interest it seeks to vindicate." *Ibid.*

Chief Judge Wald dissented from the judgment and opinions of the two other members of the panel, stating that "[i]n casting off a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end, the majority has too rigidly applied Supreme Court affirmative action guidelines designed for other types of programs, ignored firm precedents in this circuit, and failed to credit the explicit intent of Congress." 876 F.2d at 934.

Both the FCC and Astroline sought rehearing *en banc* arguing that the two judges failed to defer to Congress' judgment that promoting broadcast diversity justified the use of the distress sale policy for minority buyers in "the small numbers of situations each year where the FCC orders a hearing on a broadcast licensee's basic qualifications." FCC Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2, 3. Further, the FCC said that the analysis used by the two judges below was

so flawed that, if it were adopted as precedent in other courts, it could "invalidate almost any race-conscious programs that a federal agency or Congress could devise." *Id.* at 14.

On June 16, 1989, the Petitions for rehearing *en banc* were denied by a 5-5 vote among the judges in regular active service on the court, thus preserving the panel opinion. Chief Judge Wald dissented from the denial of rehearing *en banc*, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg. They joined in Chief Judge Wald's dissent, in which she wrote that "the continued use of the distress sale policy has been mandated by an Act of Congress." 876 F.2d at 958.

Astroline took an appeal to the United States Supreme Court by writ of certiorari, which was granted. —— U.S. —— (released January 8, 1990).

STATUTORY AND REGULATORY PROVISIONS

The Constitution of the United States and the First and Fifth Amendments thereto, the Communications Act of 1934, 47 U.S.C. 307(c), the Communications Amendments Act of 1982, 47 U.S.C. secs. 309(i)(3)(A) and (C)(ii), the Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987), the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186 (1988), and Pub. L. No. 101-62 (1989).

STATEMENT OF THE CASE

Astroline obtained the license for television station WHCT-TV in Hartford, Connecticut under the FCC's distress sale program, which permits a licensee designated for hearing on license revocation or on character issues raised on license renewal, to assign its license to a minority-controlled entity for no more than 75 percent of its appraised value. *Statement of Policy on Minority*

Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978); *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982). The FCC adopted the distress sale program to promote diversity of viewpoint through diversity of ownership in the nation's airwaves, and to remedy the effects of "historical underrepresentation of minorities in broadcasting." *Id.*

Shurberg Broadcasting of Hartford, Inc. and its principal, Alan Shurberg (collectively "Shurberg"), petitioned the FCC to entertain a competing application for WHCT-TV, and challenged Astroline's status as *bona fide* minority-controlled. In *Faith Center, Inc.*, 99 FCC 2d 1164 (1984), the FCC approved the distress sale to Astroline, and an appeal followed. Astroline assumed ownership and management of WHCT-TV during the three years between oral argument and decision in this case, and currently operates this station on Channel 18. Judges Silberman and MacKinnon wrote separate opinions, disagreeing as to the constitutionality of Congressional determinations that minority ownership would lead to diversity of viewpoint, but both concede the compelling governmental interest in diversity in broadcast programming. Chief Judge Wald dissented, maintaining that the program serves a compelling governmental interest, and that its means are narrowly tailored to achieve that end.

SUMMARY OF ARGUMENT

The distress sale policy is constitutional. This race-conscious policy serves the recognized, strongly compelling public need to augment the participation of minorities in determining the content, balance, and scheduling of this nation's broadcast programming, to the benefit of both minority and nonminority listeners and viewers. It meets every requirement of applicable precedent, and it avoids every pitfall that has invalidated other race-conscious programs.

The distress sale policy, adopted originally by the Federal Communications Commission at the request of the Congressional Black Caucus, has since been mandated by express enactment in at least three Federal statutes. It permits the owner of a broadcast station whose license is at issue in a license revocation proceeding of whose character qualifications are at issue in a license renewal hearing, to make a "distress sale" of the station to a minority buyer at a discounted price.

The policy meets every legislated and adjudicated requirement. It serves a need so compelling that this need has stood for decades as the cornerstone principle governing broadcast allocations, licensing, and regulation: providing to the American public information from as many diverse sources as possible. Nothing in the panoply of public interest objectives governing the federal government's action respecting broadcasting touches a deeper chord, or is more universally recognized, than that broadcasting must contribute its indispensable share to the array of diverse, and even antagonistic, sources of information available to the public. On that depends nothing less than much of the ability of the citizens of the United States, as members of a free society, to exercise their freedoms in an informed manner, wisely, and in the best interests of all.

That our multi-faceted society—the "melting pot"—will not only benefit from, but crucially needs, information from diverse and antagonistic sources is rudimentary, and virtually universally recognized. That this need is well served by unfettered participation by minorities in the flux of public debate on matters of concern to minorities and nonminorities alike is rudimentary, and recognized by all enlightened persons of good will. The inevitable corollary is that adequate minority participation in shaping the programming fare offered to all elements of the broadcast audience—virtualy synonymous with the entire populace—is compellingly important to the well-being of this society.

The FCC has recognized this. Congress has also. So has the Court of Appeals for the District of Columbia Circuit in cases that antedated this Court's landmark *Bakke*, *Wygant*, and *Croson* decisions on race-conscious programs that sought to serve a compelling public need. The two judges below in the instant case mistakenly construed those decisions by this Court as invalidating the distress sale policy.

The FCC, Congress, and the Court of Appeals for the District of Columbia Circuit in previous decisions, have recognized that a practicable, effective way open to governmental authorities to foster programming diversification regarding minority concerns that touch the interest of both minorities and nonminorities is by augmenting minority ownership of broadcast stations. The distress sale policy contributes modestly, but significantly, to this objective, thus heluing to fulfill a compelling public need.

None of the vices that have been held to invalidate other race-conscious programs applies to distress sales of broadcast stations. A finding of compelling public need is not lacking. That finding was made by Congress in the exercise of its broad, express power, that this Court has recognized, to devise and adopt legislation enforcing the provisions of the 5th and 14th Amendments. It thus does not suffer the disability of being a sparsely or incorrectly documented finding by a political subdivision of a state. The Congress acted on the basis of information before it from which it was rational to infer the compelling need that it found to enhance diversification of broadca[illegible] programming sources by augmenting minority ownership—in part through the FCC's distress sale policy that the FCC now applies, in conformity with express statutory directives.

The distress sale policy is not a set-aside of a fixed quantity or percentage of benefits, and is thus not subject to disabilities that have been held to invalidate

some—but not all—set-asides of stated percentages of benefits for exclusive participation of minorities. Of many thousands of broadcast stations that have changed hands since the FCC adopted the policy, fewer than 40 have passed to minority buyers under the application of that policy.

There was no failure to seek and try non-racially conscious means of fulfilling the ascertained compelling public need. The distress sale policy is one of the means mandated by the Congress to supplement other, non-racially-conscious methods that had failed to lift the level of minority ownership of broadcast stations above 2% of the total. To the modest extent that the distress sale policy has affected, or could be expected to continue to effect increased minority ownership of broadcast stations, it has not done so by depriving any person of a broadcast license to which he is entitled. The policy is thus not analagous to depriving employed persons of their jobs that this court has held places an excessive burden on affected nonminority persons.

The remedy is not disproportionately broad. It is modest in scale, but directly tailored toward supplementing other means that have been developed to serve the same needs. In short, correctly viewed, the distress sale policy meets every adjudicated requirement of a race-conscious means to fulfill a compelling public need, albeit a different one from those that members of this court have hitherto expressly recognized as potentially compelling (i.e., remedying the effects of past discrimination, and enhancing the diversity of a state university's student body). The express recognition that members of this Court have accorded to diversity at universities as a potentially compelling public need strongly supports the conclusion that, *a fortiori*, the need to enhance deficient diversity in the ownership of the encompassing medium of broadcasting, which directly touches all, is more than sufficiently compelling to justify the race-conscious procedure that the distress sale policy entails.

ARGUMENT

I. THE FEDERAL PROGRAM TO PROMOTE MINORITY OWNERSHIP IS CONSTITUTIONAL.

The goal to increase minority ownership has been embraced by all branches of the Federal Government. In *Loyola University v. FCC*, 670 F. 2d 1222, 1225-26 (D.C. Cir. 1982), the court held that the FCC had properly considered the expansion of minority ownership as a public interest factor weighing the favor of modification of it clear channel rules to permit additional stations to use those channels. The court cited with evident approval the FCC's conclusion that "all three branches of government have recognized the importance of fostering minority participation in ownership and operation of broadcast stations." *Id.* at 1226, n.9.

In *West Virginia Broadcasting Co. v. FCC*, 735 F.2d 601, 613 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), this Court held that the FCC's grant of an enhancement credit in comparative hearings to minority applicants "easily passes constitutional muster" in light of the Supreme Court's standards for affirmative actions programs in *Fillilove v. Klutznick*, 448 U.S. 448 (1980) and *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Increasing diversity of broadcasting content, this Court held, is "a vital part of the FCC's public interest mandate" which should be pursued through FCC policies to promote ownership by minorities who were "excluded from and remain[] extremely underrepresented within the nation's broadcast media." 735 F.2d at 611. *West Michigan* followed and reaffirmed two prior decisions of this Court, *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975), in which the Court pressed upon a then-reluctant FCC the duty to give favorable consideration to minority applicants for broadcast licenses. *See generally*, Wilson, "Minority and Gender Enhancements: A Necessary and

Valid Means to Achive Diversity in the Broadcast Marketplace," 40 *Fed. Comm. L.J.* 89 (1988).

Subsequent to *West Michigan*, the Court of Appeals again found a firm constitutional basis for the FCC's minority preference programs, expressly including the distress sale policy. Judge Tamm concluded that "under our decisions, the Commission's authority to adopt minority preferences event apart from the lottery process—at least where such preferences are tied to minority participation in the management of broadcast facilities—is clear." *Steele v. FCC*, 770 F.2d 1192, 1196 (D.C. Cir. 1985), *vacated and rehearing en banc granted* (Oct. 31, 1985). (The case was subsequently settled, and thus no final decision was rendered on the merits.)

In fact, the holding of neither *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) nor *City of Richmond v. J. A. Croson*, 109 S. Ct. 706 (1989) lessen *West Michigan's* continuing force. Both *Wygant* and *Croson* dealt with programs created by local authorities, not by Congress, while the distress sale policy, like the FCC's other minority preference policies aimed at fostering diversity of expression through diversity of ownership, has Congress' explicit imprimatur. *See* Sec. II, *infra*. The *Croson* plurality stressed " 'that *in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.' " 109 S. Ct. at 718, *quoting Fullilove*, 448 U.S. at 483 (emphasis by the Court). *See Cleland v. National College of Business*, 435 U.S. 213 (1978); *Mathews v. De Castro*, 429 U.S. 181 (1976) (Congressional deference is accorded to legislation raising equal protection concerns).

Moreover, *Wygant* and *Croson* each dealt with programs intended solely to remedy discrimination. The distress sale policy, by contrast, also rests on the compelling governmental interest in diversity of expression in broadcasting, a First Amendment concern at the heart

of the FCC's public interest responsibilities under the Communications Act of 1934. *FCC v. National Citizens Commission for Broadcasting*, 436 U.S. 775, 795 (1978).

This brief refers both to the need to enhance programming diversification and to remedy underrepresentation of minorities in broadcasting. Both are compelling public needs. Thus either, standing alone, is sufficient to justify the distress sale policy.

II. CONGRESS HAS EXPRESSLY APPROVED THE DISTRESS SALE PROGRAM AND ORDERED THE FCC TO CONTINUE IT.

The distress sale program is neither the invention of a state or local government nor the creation of a federal agency acting solely on its own authority. As Chief Judge Wald noted, it is "a deliberately chosen congressional policy, embodied in legislation passed by the House and Senate and signed by the President." *See Shurberg* at 943. In *Fullilove*, the Supreme Court stressed the deference courts owe to Congress' authority to make findings and prescribe remedies to advance government interests. 448 U.S. at 472. Conversely, Judge Silberman, while admitting that "Congress may act to remedy past discrimination based upon less particularized historical evidence than would be required of another governmental body or court of law" boldly and erroneously faults Congress for failing to compile an adequate factual record. He concludes that the Congressional record compiled over a twelve-year period amounted to "simply assertions," "meager evidence" and "ipse dixit." *Shurberg* at 909-28. The judicial denigration of the legislative process exhibited by the junior member of the lower court panel amounted to "belittlement of Congress". See, *Shurberg* at 940, n.29. (dissent, Wald, C.J.) Not only are Judge Silberman's observations an inappropriate basis for invalidating the legislative actions of a co-equal branch of government, his conclusion is not factually correct. Indeed, Congress has established a long record on this issue. *See* Senate Report on Minority Ownership of Broadcast

Stations: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation. 101 Cong. 1st Sess. (1989). *See also* S.Rep. 182, 100th Cong., 1st Sess. 76 (1987).

In 1982, Congress required the FCC, if it replaced the comparative hearing process with a lottery, to adhere to its existing preferences for minority applicants. In the Conferees report, Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982), 128 Cong. Rec. H6527, 22138-42, 22140 (daily ed. August 19, 1982). Sec. 115, Communications Amendments Act of 1982, Pub.L. No. 97-259, 47 U.S.C. § 309(i)(3)(A) and (C)(ii). Congress' action, based on findings of prior discrimination and the need to foster diversity, "must be viewed as congressional approval of the FCC's minority ownership promotion policies." *West Michigan*, 735 F.2d at 616 (footnote omitted). In 1987, after the FCC said it wanted to reexamine the constitutionality of those policies, and requested a remand of this case for that purpose, Congress again intervened and forbade the FCC to retreat from its minority preference policies, expressly including the distress sale policy at issue here. Pub.L.No. 100-202, 101 Stat. 1329 (1987). "Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's *goals and means*." *West Michigan*, 735 F.2d at 615, *quoted in Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, at 358 (D.C. Cir. 1989) (emphasis added).

Judge Silberman's opinion disregards Congress' approval of the distress sale program because Congress, in his view, failed to make "historical findings of fact," and lacked "support of any material developed in congressional hearings. . ." *Shurberg*, 876 F.2d at 923-26. This is contrary to the *Fullilove* plurality's holding that "Congress, of course, may legislate without compiling the

kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. "Such an intrusion into Congress' legislative deliberations would pose serious separation-of-powers problems, and neither the language nor logic of the Constitution compels such an inquiry." *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984); *see also* disent (Wald, C.J.) 13-15.[1]

Moreover, *Fullilove* made clear that Congress need not act on the evidentiary record and findings that Judge Silberman would require. The *Fullilove* Court quoted at length a House report that relied on the "*presumption*" that "past discriminatory systems have resulted in present economic inequities," 448 U.S. at 465, referred to the "fundamental congressional *assumption*" underlying the program (*id.* at 487), and upheld "the use of racial and ethnic criteria . . . premised on *assumption* rebuttable in the administrative process." *Id.* at 489 (emphasis added). A similar legislative history was gather concerning minority participation in telecommunications. *See* Cable Television Industry, Hearings before the Subcommittee on SBA and SBIC Authority, Committee on Small Business, House of Representatives, 97 Cong. 1st Sess. (1981)

Nor is Congress' power to act on reasonable assumptions confined to the remedial context. Justice Powell's

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[1] Judge Silberman belittles Congress' findings of a nexus between ownership and programming as being "in the nature of *predictions* as to future behavior" rather than historical findings of fact. 876 F.2d 902, 940-42 (emphasis in original). The Judge attempts to impose a new standard of judicial review. When the FCC makes predictive policy judgments, "'complete factual support for the Commission's ultimate conclusions in not required,'" because those judgments are matters for the agency's expertise. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660 (D.C. Cir. 1989), *quoting FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981). Congress' findings here were based in part on just such a predictive factual judgment by the FCC "about the overall effects of a policy on licensees and others." 867 F.2d at 660.

pivotal opinion in *Bakke* confirmed the ability of a university to take race into account in assembling a diverse student body. That opinion required neither evidence nor Congressional findings to establish the nexus between racial diversity and educational quality. Rather, he wrote, educational excellence is "*widely believed* to be promoted by a diverse student body," 438 U.S. at 312 (emphasis added), citing only an article by a university president who said that "[i]n the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs." *Id.* at n.48. The contribution of diversity to education rested not on findings or evidence, Justice Powell said, but on "our tradition and experience." *Id.* at 313.

Bakke and *Fullilove* thus support the Court of Appeals holdings that "[r]easonable expectation, not advance demonstration" is sufficient to establish the nexus between ownership diversity and diversity of content. *West Michigan*, 735 F.2d at 610, *quoting TV 9*, 495 F.2d at 938. That nexus has been found not merely by a state university as in *Bakke*, or by the FCC, but by Congress itself. *Bakke* and *Fullilove* thus contradict Judge Silberman's view of the legislative process, especially when it deals with a compelling governmental interest as unquantifiable as the encouragement of diverse expression. *See also Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973) ("great weight [should be accorded] to the decisions of Congress" when legislation implicated fundamental constitutional rights under the First Amendment).

This Court should not disregard specific Congressional intent. If the Court may, at will, annul the legislation of the Congress, and eliminate public policy designed to encourage the development of a robust flow of divergent viewpoints under the First Amendment and the eradication of the impact of racial discrimination under the Fifth Amendment, then our Constitutional system of government, founded on the concept of a true separation of powers, has failed.

III. THE DISTRESS SALE POLICY IS NOT A SET-ASIDE.

The distress sale policy at issue here is not a set-aside policy like the one presented in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). Therefore, the holding in *Croson* is distinguishable.[2] Before proceeding to what the distress sale policy does involve, we pause to note what it does not. The Commission's distress sale policy is not one conceived or applied as "an unyielding racial quota." 109 S.Ct. 706, 724. Unlike the local program in Richmond that required that 30% of each grant be expended for minority contractors, no percentages, goals or timetables have ever been set or proposed by the FCC or Congress for the distress sale policy.

Additionally, the distress sale policy "was put forward not as a new concept, but rather one building upon prior administrative practice", *Fullilove* at 449. The practice of "distress sales" existed many years before 1978, when the Congressional Black Caucus petitioned the Federal Communications Commission for a rulemaking to expand

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[2] The *Croson* case is most readily distinguishable because it was a plan initiated by local authorities. Of the six Justices who comprised the *Croson* majority, four drew an express distinction between the expansive powers of Congress and the more limited powers of state and local governments. *See* 109 S. Ct. at 719 (Opinion of O'Connor, J.) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate"); *id.* at 736 (Scalia, J., concurring) *Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences. In fact, as D.C. Court of Appeals Chief Judge Wald said, "the *Croson* Court's curtailment of state and local affirmative action programs makes the issue of congressional authority all the more important." 876 F.2d at 959.

the policy to allow transfers to minorities. The Commission had, permitted distress sales under unusual circumstances, including bankruptcy or physical or mental disability of the licensee. *See e.g. Radio San Juan*, 29 P&F Radio Reg. 2d 607 (1974).

On May 25, 1978, the Commission expanded its policy and declared that in certain limited instances it would permit a broadcast licensee whose license has been designated for hearing to sell their station at a "distress sale" price provided minorities will participate significantly in the new ownership of the station. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 983 (1978).

Also, the distress sale policy differs from a set-aside insofar as the decision to utilize the policy and the procedures created for its implementation are made voluntarily by private parties without mandate by the federal government. Indeed, the majority of stations presented with the precarious situation of potential license revocation opt *not* to utilize the "distress sale policy." Some of them seek and are granted special relief from the Commission enabling them to transfer the license to another concern as a part of a negotiated settlement with the agency. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 Slip Op. at 6-9 (D.C. Cir. Jan. 12, 1990). Other broadcasters whose licenses are in jeopardy seek relief under the Commission's long standing "Second Thursday" doctrine which permits the broadcaster to sell its station for "the value of the unlicensed equipment." *Second Thursday Corporation*, 22 FCC 2d 515 (1970), recon. granted 25 FCC 2d 112 (1970); *Northwestern Broadcasting Corporation* (WLTH), 65 FCC 2d 66 (1977).

In fact, not every broadcaster can even qualify for distress sale relief, because the policy is available only where no other party has filed a timely competing application. *See Clarification of the Distress Sales Policy*, 44 RR 2nd 479 (1978).

What may best illustrate the flexibility and voluntary nature of the distress sale policy (as contrasted with a rigid set-aside) is the infrequency of its utilization. While over the last dozen years nearly 9,000 stations have been sold, and nearly 100 licenses for radio and television stations were "designated for revocation hearing or . . . have been designated for hearing on basic qualification issues" (thus placing them in the pool eligible for distress sales relief), only 39 have elected to transfer their license via this policy. The remaining majority of licensees in jeopardy have either elected to fully defend their questionable practices at hearing (as Faith Center did with their other licenses prior to electing to effectuate a distress sale to Astroline of the WHCT-TV license), transfer the station by sale as part of a negotiated settlement. *See, e.g., RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057, 5062 (1988), or seek special relief from Congress. *See, e.g., Channel 9 Reallocation (WOR-TV)*, 53 RR 2d 469 (1983), *aff'd sub nom. MultiState Communications, Inc. v. FCC*, 728 F.2d 1519 (1984).

The distress sale policy is as much an agency alternative in dealing with questionable licensees as it is a program to aid minorities. The Commission's decision—which carries out a Congressional mandate—to impose a severe financial penalty on Faith Center and promptly transfer the license to a qualified broadcaster should not be reversed. The court customarily allows administrative agencies much latitude in choosing among available remedies and penalties. *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958).

Thus, the distress sale policy does not have the characteristics of a set-aside program. Rather, it is more akin to a federal initiative that offers private sector financial incentives to foster the legitimate government's

interest in diversifying control over broadcast programming, and avoiding "time consuming and expensive hearings". *Policy Statement on Minority Ownership*, 68 FCC 2d 979, 983 (1978).

Rather than place the government in the middle of every commercial transaction like that high level of regulation needed to maintain an effective set-aside program, the government's role in effectuating a distress sale is minimal, and largely centered around scrutinization only "to avoid abuses" and to determine on a case-by-case basis "how the sale would further the goals of fostering "diversified programming which is the key objective not only of the Communications Act of 1934 but also of the First Amendment". *Policy Statement on Minority Ownership, supra*, 68 FCC 2d at 983.

It was the Commission's intention to reduce government regulation and intervention by adopting the distress sale policy. In striking the balance in favor of expanding the distress sale policy the Commission concluded that "the avoidance of time consuming and expensive hearings will more than compensate for any diminution in the license revocation process as a deterrant to wrongdoing." *Policy Statement on Minority Ownership*, 68 FCC 2d at 981.

The Commission designed the distress sale policy so that the change in control of a station would largely be motivated by marketplace forces, rather than become entangled in the regulatory web of a comparative hearing. According to its instruction published by its Consumer Assistance and Small Business Division:

> "[t]he transaction begins when the buyer and seller each submit an appraisal of the station's fair market value. The average of the two is then used to determine the purchase price ratio to the fair market. If the difference between the appraisals, exceeds 5% of the average of the appraisals, the seller and buyer then seek a third appraisal. The average of all three appraisals will then be used to calculate the ratio. The purchase price must equal 75% or less of the fair market value." "Distress Sales" published by Consumer Assistance and Small Business Division, FCC Office of Public Affairs, March, 1989.

In sum, the distress sales policy is not a set-aside and therefore need not be analyzed under "the most exacting standard of review" applied when a program mandates the allocation of federal funds according to inflexible percentages solely based on race or ethnicity. *Croson*, at 724. This is particularly true when dealing with programs specifically mandated by Congress. In *Croson*, the Court acknowledged that the principal opinion in *Fullilove* "did not employ 'strict scrutiny' or any other traditional standard of equal protection review . . . [in] appropriate deference to the Congress, a co-equal branch . . ." *Croson* at 717.

IV. THE DISTRESS SALE PROGRAM IS NARROWLY TAILORED.

Although the distress sale policy should not be held to the strict scrutiny test, if it is, the policy will meet the test because it is narrowly tailored. Two judges on the Court of Appeals found the distress sale program's means inadequately tailored to its ends. Unreasonable demands for narrow tailoring, however, produce strict scrutiny that is "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.).

The deference this Court owes to a congressionally-mandated initiative extends to its means as well as its end. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). The Court in *Fullilove* "stress[ed] the limited scope of our inquiry" in dealing "not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress." *Id.* at 480, 483. Remedial plans need not "be limited to the least restrictive means of implementation." *Id.* at 508; *accord United States v. Paradise*, 480 U.S. 149, 184 (1987). And "[i]t is not a constitutional defect" that a

program "may disappoint the expectations of nonminority firms." *Fullilove*, 448 U.S. at 484.

Under *Fullilove*, a key to the constitutionality of a Congressional program is the availability of an administrative mechanism that offers "reasonable assurance" that its purposes will be accomplished and "that misapplications of the program will be promptly and adequately remedied administratively'" 448 U.S. at 487. Such a mechanism exists at the FCC: *every* distress sale application requires the specific approval of the FCC. MacKinnon Op. 10 n.16. Before Astroline's application was granted, private and public concerns were offered the opportunity to file comments or opposition to the request for special relief. Numerous petitions to deny were filed against Astroline's application. Each was thoroughly examined by the Commission, and ultimately denied. This is the type of agency review approved in other contexts, because "[administrative procedures will be adequate if the decision-making body has the opportunity to consider the appropriateness of awarding each contract on the basis of race-conscious preferences." *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 937 n.30 (9th Cir. 1987).

The FCC has said, for example, that it will be alert to ferret out distress sale purchasers that are merely minority "fronts." *Commision Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d at 855; *see Fullilove*, 448 U.S. at 487-88 ("There is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not 'bona fide' . . . spurious minority-front entities can be exposed.") Shurberg could and did raise such an objection here. *Faith Center, Inc.*, 99 FCC 2d at 1172-73. Shurberg also could and did argue that the license should be denied distress sale treatment on the basis of competing public interest considerations, *e.g.*, the interest in license competition rather than minority ownership. *Id.* at 1167-70. The FCC accepted this argument in part, by ruling that if the assignment to Astroline were not consummated, a comparative proceeding open to all comers would promptly commence. *Id.* at 1170. Far from reserving the license for a minority buyer, the FCC thus made an individualized determination.

Narrow tailoring requires the agency to consider alternative race-neutral means of achieving a compelling governmental interest. *United States v. Paradise*, 480 U.S. 149, 171 (1987). The FCC promulgated "ascertainment" rules in an unsuccessful attempt to encourage minority participation in programming. *Public Notice, Statement of Policy on Minority Ownership at Broadcasting Facilities*, at 3 (FCC 78-322, released May 25, 1978 (Mimeo No. 2734)). Also, in 1978 the Commission relaxed its requirement that an applicant be able to show enough financing to operate a new station for twelve months without commercial revenue. The new regulation required only a showing that the new operator could operate for three months, thus reducing a barrier to entry. In so doing, the Commission hoped that this "race-neutral" policy would significantly enhance minority ownership. *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); *see also*, 87 FCC 2d 200, 201 (1981). Unfortunately, it did not.[3] Therefore, there remained the need for a flexible race-conscious program to encourage diversity and to curtail

[3] Congress also explored "racially-neutral" ways to increase minority ownership. As advertising is the life blood of commercial broadcasters, Congress examined the flow of federal ad procurement and concluded *"Federal Use of Small Disadvantaged Subcontractors is Minimal." See* Federal Advertising, GAO/RCD, 89-54, June, 1989. ("Twelve federal agencies procured advertising services in fiscal year 1986; their total advertising budget in 1986 was approximately $166 million. Of this amount, approximately 1 percent was spent with small disadvantaged firms as prime contractors. . . . In fiscal year 1986, DOD, the largest buyer of advertising services (97% of federal budget), did not use small disadvantaged advertising and media firms as prime contractors.")

the underrepresentation of women and minorities in the ownership ranks of the media. The First Amendment forbids direct regulation of program content; the alternative of directly requiring diverse programming is foreclosed.[4] "'Diversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *National Citizens Commission for Broadcasting*, 436 U.S. at 796-97 (citation omitted.)

A narrowly tailored program also should not unreasonably limit the opportunities of innocent nonminorities. *Local 28 of Sheet Metal Workers' International Association v. EEOC*, 106 S.Ct. 3019 (1896). *Some* burden on nonminorities, however, is acceptable and inevitable in any race-conscious remedial program. "'[A] sharing of the burden' by innocent parties in not impermissible." *Fullilove*, 448 U.S. at 484; *see also Wygant*, 476 U.S. at 280-81. Unlike the laid-off teachers in *Wygant*, Shurberg did not lose his job, or a station license, but simply the opportunity to contend—along with an indeterminate number of "other interested parties" (99 FCC 2d at 1170)—for the WHCT-TV license. Shurberg had no assurance of gaining the license in a comparative hearing; Faith Center might have retained it, or another party (including Astroline) could have emerged victorious. Judge Silberman characterizes Shurberg's opportunity as "unique" because "[i]t is a Hartford station Shurberg wants. . ." Silberman Op. 33. But nothing in the Supreme Court's affirmative action decisions supports measuring the burden on nonminorities by the particularity of their desires. The broadcast industry assuredly was, and remains, open to Shurberg; he was, and remains, free to purchase or compete for a broadcast station in Hartford or elsewhere. Indeed, Astroline's application

[4] *See, Hart*, "The Case for Minority Broadcast Ownership," Gannett Center Journal 54 (Winter 1988).

was up for renewal in 1989, and Shurberg failed to file a competing application, although six other competing applications were filed.

The distress sale policy also benefits nonminorities. It provides direct economic relief to an incumbered licensee that could otherwise suffer far greater loss should its license be revoked after the hearing. The policy also saves considerable administrative resources by eliminating the lengthy hearing process.

The Commission, in granting the transfer of WHCT-TV to Astroline, concluded that this was an appropriate case in which Faith Center (a problem broadcaster that had lost its other licenses) should be removed from broadcasting, but without the harshness attending an outright denial of its renewal applications. The Commission also found that the settlement agreement served the public interest by simplifying a complex case, saving administrative costs, and removing a "cloud" of uncertainty that can adversely affect a station's performance. These are the same benefits recognized by the Court of Appeals in *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285, slip op. at 7, 9 (D.C. Cir. Jan. 12, 1990).

The distress sale policy is thus narrowly tailored because it offers "reasonable assurance" that diversity of program content will be enhanced and any flaws in the policy will be handled administratively. Congress' findings that diversification of mass media is a compelling public need, and that increased minority ownership of broadcast stations would help significantly to fill that need, are entitled to recognition by this Court as validating the distress sale policy, which Congress expressly mandated as one of the means of fostering enhanced minority ownership and program diversity.

Additionally, the Congress and FCC have considered (and in fact implemented) race-neutral means of achieving these goals but they have not fully met the objectives.

Therefore, the limited infringement on non-minorities that the distress sale policy may impose is reasonable. Finally, the policy offers a number of administrative and procedural benefits and safeguards which additionally narrow the effects of the racial impact of this policy. In sum, the policy is narrowly tailored and should be upheld even under the strict scrutiny analysis.

CONCLUSION

The distress sale policy has been mandated by Congress, serves compelling public needs including the vitally important one of diversification of broadcast programming, is narrowly tailored, was adopted as a race-conscious remedy only after other, race-neutral remedies failed to achieve the objective, and does not excessively burden affected nonminority persons. Therefore, the decision of the Court of Appeals invalidating the distress sale policy as unconstitutional should be reversed.

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